IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 14682 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MR. P.JAYRAM MANAGING DIRECTOR & 2 - Applicant(s)
Versus
ARVIND ATMARAM PROP.OF M/S.ARVIND ATMARAM & 1 - Respondent(s)

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Appearance :

MR SV RAJU for Applicant(s) : 1 - 3.
MR MANISH R BHATT for Respondent(s) : 1,
MR RC KODEKAR, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 09/07/2007

ORAL JUDGMENT

1. By way of this application under section 482 of the Criminal Procedure Code, the petitioners –

original accused Nos.1 to 3 have prayed to quash and set aside the complaint dated 27.11.2006 filed before the learned JMFC, Dholka being complaint No. 2401 of 2006 for the offence under section 138 of the Negotiable Instrument Act; 1881 (hereinafter referred to as “the Act” for short) as well as the order of the learned Magistrate issuing the process and all the proceedings incidental thereto.

2. At the outset, Shri S.V.Raju, learned advocate appearing for the petitioners, more particularly, petitioner No.1 does not press the present application qua the petitioner No.1 and restricts the prayer in the present application qua the petitioners No.2 and 3 only.

3. A criminal case / complaint No. 2401 of 2006 is filed by the respondent No. 1 herein – original complainant against the petitioners for the offence under the provisions of the Act contending inter-alia that the accused Nos.1,2 and 3 are the Managing Directors and the

Directors of M/s. Selvarani Cotton Mills Private Limited and the complainant had sold and delivered 812 bales of cotton to the accused Nos.1,2 and 3 through their agent for an amount of Rs.81,734/-. That against the said transaction, accused have paid an amount of Rs. 13,50,000/- towards the outstanding amount and it was credited by the complainant in the account and thereafter, Rs. 67,50,734/- remained due and payable by the accused. That after repeated request and demand made by the complainant, the accused No.1 has issued 7 cheques for Rs.61,00,734/- against the outstanding amount of the complainant. That as per the promise, the complainant had deposited the above cheques and from the above said cheques, first cheque of Rs. 10,00,000/- dated 11.9.2006 bearing cheque No. 018187 was deposited in Peoples Co-operative Bank Limited, Dholka in his account and the same was returned on 13th September, 2006 with an endorsement "**account closed.**" Thereafter, the complainant have intimated for the same. Again as per the

accused No.1's promise, complainant have deposited the remaining cheques in the HDFC Bank, Ahmedabad on 27.9.2006 and the same were bounced and returned back with an endorsement **“account closed**.” The bankers intimated to the complainant on 13.9.2006 and 29.9.2006 for the same. That thereafter the complainant send Regd A.D. Notice dated 9.10.2006 and made a demand on the accused under the provisions of the Act. The accused received the said demand notice and acknowledged the same. That inspite of the receipt of the aforesaid notice dated 9.10.2006 neither the payment was made nor the obligation was fulfilled within 15 days of the receipt of the said notice and therefore, the complaint came to be filed for the offence under the Act. That in the said complaint, the learned JMFC, Dholka by its order dated 27.11.2006 issued summons upon all the accused for the offence under section 138 of the Act. Being aggrieved and dissatisfied with the same, the original accused Nos.2 and 3 have preferred the present application under section 482 of the Criminal

Procedure Code for the aforesaid reliefs.

4. Shri S.V.Raju, learned advocate appearing for the applicants – original accused Nos.2 and 3 has vehemently submitted that the relevant averments constituting the offence under section 138 of the Act against the petitioners are lacking in the complaint. It is further submitted that there are no clear allegations in the complaint against the applicants to the effect that the applicants were in-charge of the affairs of the company at the relevant time. It is also further submitted that the allegations in the complaint do not satisfy the ingredients of Section 138 of the Act so far as petitioners – original accused Nos.2 and 3 are concerned and therefore, process issued against them are required to be quashed and set aside. Shri Raju has relied upon the decision of the Hon'ble Supreme Court in case of ***S.M.S. PHARMACEUTICALS LTD. V/s. NEETA BHALLA & ANOTHER*** reported in **2005 (8) SCC 89** as well as subsequent decision of the Hon'ble Supreme Court in case of ***S.M.S.***

PHARMACEUTICALS LTD. V/s.NEETA BHALLA & ANOTHER reported in **2007(3) SCALE 245** in support of his prayer to quash the Criminal complaint / case.

5. Shri M.R.Bhatt, learned advocate appearing for the respondent No.1 – original complainant has submitted that there are sufficient averments in the complaint against the applicants – original accused Nos.2 and 3 making out a case under section 138 of the Act and therefore, it is requested not to exercise powers under section 482 of the Criminal Procedure Code and to dismiss the petition.

6. Shri R.C.Kodekar, learned APP has submitted that looking to the averments in the complaint, an appropriate order be passed.

7. Heard the learned advocates appearing for the respective parties.

8. The complaint is filed against the petitioners – original accused Nos.2 and 3 for the offence

under section 138 of the Act. The learned trial Court has also issued summons against the petitioners for the offence under section 138 of the Act. No offence under section 141 of the Act is alleged nor even the learned trial Court has issued the summons for the offence under section 141 of the Act. It is also required to be noted that even as per the averments in the complaint, the original accused No.1 issued 7 cheques for Rs. 61,00,734/-. It is also further averred in the complaint that he complainant have deposited the remaining cheques as per the accused No.1's promise. There are no further allegations / averments in the complaint against the petitioners / original accused Nos.2 and 3 to the effect that either they were in charge or they were actively participating in day today affairs of the company. In para – 2, the only averments against the petitioners are that they are the directions of M/s. Selvarani Cotton Mills Private Limited. Except the above, there are no averments against the petitioners – original accused Nos.2 and 3. Except the

aforesaid averments also, there are no allegations / averments against the original accused Nos.2 and 3 that they were in charge of the company and/or they were in active management of the company. As held by the Hon'ble Supreme Court in case of ***S.M.S. PHARMACEUTICALS LTD.*** (supra), it is ncessary to aver in the complaint for the offence under the Act that at the time when the offence was committed, the present accused were in-charge of the and responsible for the conduct and business of the company. As held by the Hon'ble Supreme Court, the said averment is an essential requirement of the provisions of the N.I.Act and has to be made in a complaint and without this averment being made in a complaint, requirement of section 141 of the Act cannot be said to be satisfied. It is also further observed by the Hon'ble Supreme Court that merely being a Director of the company is not sufficient to make the person liable under section 141 of the Act. Requirement of section 141 is that the person sought to be made liable should be in-

charge of and responsible for the conduct and business of the company at the relevant time and this has to be averred in the complaint as a fact as there is no deemed liability of a Director in such a case. Now, looking to the averments and the allegations in the complaint, it is not averred that the applicants as Directors were in-charge of the company. Thus, on bare perusal of the complaint, the allegations in the complaint do not satisfy the ingredients of section 138 r.w. Section 141 of the Act by which the accused Nos.2 and 3 can be held vicariously liable under section 141 of the Act. Under the circumstances, the complaint being Complaint No. 2401 of 2006 requires to be quashed and set aside qua the original accused Nos.2 and 3.

9. For the reasons stated above, the summons issued by the learned trial Court against the applicants – original accused Nos. 2 and 3 in criminal case No. 2401 of 2006 are hereby quashed and set aside. The complaint against

rest of the accused be continued and proceeded further in accordance with law and on its own merits.

10. At this stage, Shri S.V.Raju, learned advocate appearing for the petitioners – original accused No.1 under the instructions of Shri K. Kandakumar Raj – advocate of the original accused No.1 has submitted that the original accused No.1 will appear before the learned trial Court on 25.7.2007 either in person or through his advocate.

11. Rule is made absolute to the aforesaid extent qua applicant Nos.2 and 3 – original accused Nos.2 and 3.

[M.R.Shah, J.]

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